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THE SOLICITORS' JOURNAL

APRIL 3, 1959



VOLUME 103

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CURRENT TOPICS

Adoption Act, 1958, and Rules Operative

THE Adoption Act, 1958, which is a consolidating Act replacing the Adoption Act, 1950, as amended by the Children Act, 1958, came into force on 1st April. Although the general arrangement of the Act resembles the 1950 one many changes have been made. In respect of adoption orders there are, *inter alia*, changes concerning the minimum age of an applicant, consents, jurisdiction and procedure in England and Wales with modifications of the provisions in case of applicants resident outside Great Britain, affiliation orders, English intestacies and legitimation. Part II of the Act deals with local authorities and adoption societies; Pt. III with care and possession of infants awaiting adoption; Pt. IV with supervision of children awaiting adoption or placed with strangers and Pt. V with such miscellaneous matters as restriction on removal of infants for adoption outside the British Islands and provisional adoption by persons domiciled outside England and Scotland. The Adoption (High Court) Rules, 1959 (S.I. 1959 No. 479 (L.3)), lay down the procedure to be followed in proceedings in the High Court under the Adoption Act, 1958. They revoke and replace the Adoption of Children (High Court) Rules, 1950, as amended. The First Schedule to the rules sets out nine forms to be followed in connection with applications for the making of adoption or provisional adoption orders. The Adoption (County Court) Rules, 1959 (S.I. 1959 No. 480 (L.4)), which—like the High Court rules—became operative on 1st April, were similarly necessitated by the 1958 Act and replace the Adoption of Children (County Court) Rules, 1952. The First Schedule to the new rules contains the wording of eleven prescribed forms. The corresponding rules for magistrates' courts are the Adoption (Juvenile Court) Rules, 1959 (S.I. 1959 No. 504). All three sets of rules deal with who may be appointed guardian *ad litem* and the Second Schedule to each set lists his particular duties; all cover the procedure of fixing the time for the further hearing of an application for an adoption order after an interim order has been made and provide for the supplying of the adopter with an abridged copy of the adoption order. Rule 1 of the Rules of the Supreme Court (No. 1), 1959 (S.I. 1959 No. 450 (L.2)), prescribes the procedure on an appeal from the making or refusal of an adoption order by a magistrates' court.

Tribunals Act Partly Operative

THE Tribunals and Inquiries Act, 1958 (Commencement) Order, 1959 (S.I. 1959 No. 451 (C.5)), has brought into force on 1st April ss. 8, 9 and 12 of that Act. Section 8 provides, *inter alia*, that no power of a Minister (or of the LORD PRESIDENT of the Court of Session) to make, approve, confirm

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or concur in procedural rules for any of the many tribunals specified in Sched. I to the Act may be exercised except after consultation with the Council on Tribunals set up under the Act. In respect of proceedings before certain specified tribunals, s. 9 gives a right to any party concerned who is dissatisfied in point of law with a decision of the tribunal on or after the appointed day either to appeal therefrom to the High Court or require the tribunal to state and sign a case for that court's opinion. Such a right must be exercised in accordance with the rules of court. Applicable and detailed rules have been promulgated by the Rules of the Supreme Court (No. 1), 1959 (S.I. 1959 No. 450 (L.2)), r. 2, containing what is to be known as Ord. 59A. The specified tribunals include those concerned with children's voluntary homes, independent schools, mines and quarries, nurses' training institutions, prevention of fraud (investments) and wireless telegraphy as well as the tribunals constituted under the Furnished Houses (Rent Control) Act, 1946, s. 1, and the National Health Service Act, 1946, s. 42. Section 12 of the 1958 Act requires reasons to be given for decisions of the specified tribunals and by any Minister notifying a decision after the holding of a statutory inquiry. A statement of reasons may be refused in certain limited circumstances, for example, on grounds of national security, and by s. 12 (4) it is possible for specified tribunals to be exempted from giving reasons on the ground that it is unnecessary or impracticable to give them. In accordance with that subsection the Tribunals and Inquiries (Revenue Tribunals) Order, 1959 (S.I. 1959 No. 452), grants such exemption in respect of decisions of the Board of Referees and decisions of Income Tax Commissioners to which the appeal procedure by way of case stated under the Income Tax Act, 1952, applies—except decisions of the Special Commissioners in cases in which a re-hearing by the Board of Referees may be required. We welcome this further evidence, in the form of the Commencement Order cited, that the Government are determined to implement the accepted recommendations of the Franks Committee as soon as possible.

Supreme Court Rules and Agriculture

RULE 3 of the new Rules of the Supreme Court, cited above, amends Ord. 59B—relating to references to the High Court by agricultural land tribunals—in consequence of the Agriculture Act, 1958, s. 4. Rule 3 of that Order is replaced by one entitling an authority, empowered to enforce a statutory requirement specified in an application to such a tribunal under that section, to appear and be heard on the reference.

Obstructing the Highway

THE offence of obstructing the highway may be committed by reason of the infringement of a prohibition or restriction contained in one of several statutes or regulations made under them. For example, it has been held that it is an offence under s. 72 of the Highway Act, 1835, for an innkeeper to use a part of a public highway as a parking place for his guests' vehicles (*Gerring v. Barfield* (1864), 16 C.B. (N.S.) 597) and for a surveyor to leave a number of large stones insufficiently lighted on a road which was under repair (*Fearnley v. Ormsby* (1879), 43 J.P. 384). Apart from the provisions of s. 72 of the 1835 Act, s. 28 of the Town Police Clauses Act, 1847, makes it an offence to obstruct a public footpath and it seems that the obstruction of both a highway and a public footpath may also amount to a public nuisance.

In recent days there have been two interesting pronouncements on the law relating to obstruction. The first was made in the House of Commons (13th March) after Mr. GRAHAM PAGE had drawn attention to the removal by the police of certain "No Parking" boards which had been placed in the roadway outside St. Martin-in-the-Fields School. Mr. DAVID RENTON (Joint Under-Secretary of State for the Home Department) thought that this action was "fully justified" as the placing of unauthorised signs on the highway is illegal. He reminded the House that the parking of a car on the highway at a point where parking has not been prohibited by the Minister of Transport is not illegal unless it can be shown that the vehicle was parked in such a way as to cause unreasonable obstruction to traffic. More recently, the owners of a Nottingham cinema were fined £2 for obstructing the pavement with a wooden board bearing the words "Queue here. 3s. 9d." The magistrates recognised that it has been the custom for cinemas to make use of these boards, but they held that they had no right to use them in this way.

Res Ipsa Loquitur

As a general rule, the plaintiff is required to prove negligence, but his task is often made easier by the application of the maxim *res ipsa loquitur*. This doctrine was recently considered by the Manitoba Court of Appeal in *Kullberg's Furniture, Ltd. v. Flin Flon Hotel Co., Ltd.* (1959), 16 D.L.R. (2d) 270. The plaintiff was lessee of business premises which were self-contained but formed part of a building in which his lessor, the defendant, operated a hotel, certain rooms of which were situated immediately above the plaintiff's furniture store. It seems that on several occasions water leaked through the ceiling of the plaintiff's premises from rooms under the exclusive management and control of the defendant and that on two of those occasions furniture displayed in the plaintiff's store was damaged. The defendant called no witnesses and offered no evidence to explain or contradict these facts. Their lordships held that the rule *res ipsa loquitur* was applicable and that the judgment in favour of the plaintiff should be affirmed. Unlike *Rickards v. Lothian* [1913] A.C. 263, where the jury found that the damage "was the malicious act of some person," there was no evidence to justify an inference or finding that the escape of water from the defendant's hotel was the consequence of the acts of a third party. SCHULTZ, J.A., reminded the defendant that in *Walsh v. Holst & Co., Ltd.* [1958] 1 W.L.R. 800 the defendants had tendered evidence which satisfied the court that they had not been negligent and therefore the action failed. In the absence of similar evidence by the defendant in the case with which they were then confronted, their lordships found that the doctrine of *res ipsa loquitur* entitled the plaintiff to succeed. The burden of proof had shifted from him and it had not been discharged.

Selected Appointed Days

FROM to-day we are adding a new section to our feature entitled In Westminster and Whitehall. The new section will list the dates of appointed days for the coming into operation of selected statutes and statutory instruments of general as distinct from local interest. From inquiries which we receive it appears that there is a demand for such a list to be readily available. Accordingly we propose to repeat for several weeks running the operative dates of the selected Acts and Orders.

STANDARD OF PROOF IN MATRIMONIAL PROCEEDINGS

In *Coleman v. Coleman* (*The Times*, 18th March, 1959) we have the latest case to demand an answer to a problem present in all divorce proceedings in the English Divorce Court. Put briefly, the problem is to ascertain by what standard of proof must testimony adduced in a divorce suit be adjudged, or, to be more accurate, what is the correct interpretation of s. 4 of the Matrimonial Causes Act, 1950.

That section provides:—

(1) On a petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged, and whether there has been any connivance or condonation on the part of the petitioner, and whether any collusion exists between the parties, and also to inquire into any counter-charge which is made against the petitioner.

(2) If the court is satisfied on the evidence that—

(a) the case for the petitioner has been proved; and

(b) where the ground of the petition is adultery, the petitioner has not in any manner been accessory to, or connived at or condoned, the adultery, or, where the ground of the petition is cruelty, the petitioner has not in any manner condoned the cruelty; and

(c) the petition is not presented or prosecuted in collusion with the respondent or either of the respondents

the court shall pronounce a decree . . . but if the court is not satisfied with respect to any of the aforesaid matters, it shall dismiss the petition.

Does the section mean that the court must be satisfied:—

(a) with the same strictness of proof demanded by an English court of the prosecution when dealing with a criminal charge; or

(b) with the less strict proof normally asked of the plaintiff or defendant in civil actions?

In the former the prosecution is required to prove the guilt of the accused beyond all reasonable doubt, whereas in the latter a party need prove no more than the probability of his case. An obvious approach to our problem is to inquire whether a divorce suit is classed for our present purposes as a civil action or a criminal proceeding. There is clear authority that it ranks as a civil action, for this was decided by the House of Lords in *Mordaunt v. Moncrieffe* (1874), L.R. 2 H.L. (Sc.) 374, and recently in *Hughes v. Hughes* [1958] P. 224 (at p. 228), Hodson, L.J., said: "... divorce affects status and the public interest is involved; but the fact remains that divorce proceedings *inter partes* are still civil litigation . . ."

It is reasonable to conclude from these two authorities that, since a divorce suit is civil litigation, the standard of proof should be the same as that required in the majority of civil actions, and until 1945 it is probable that the legal profession were under the impression that that was the settled position.

Cases requiring strict standard of proof for adultery

In 1945 in *Churchman v. Churchman* [1945] P. 44 the President, Lord Merriman, said (at p. 51): "The same strict proof is required in the case of a matrimonial offence as is required in connection with criminal offences properly so called." In that case the husband had by all standards of proof proved his wife's adultery with the co-respondent and the sole obstacle in his path to obtain his divorce was whether

he had connived at that adultery. It may accordingly be relevant to note that the case did not deal with proof of a matrimonial offence but with the absolute bar of connivance, and *Mordaunt's* case was not cited. In *Ginesi v. Ginesi* [1948] P. 179 the exact issue was whether a wife should lose a separation order made in her favour by a court of summary jurisdiction on the ground that since the order was made she had committed adultery. Tucker, L.J., in the Court of Appeal said (at p. 181): "I am satisfied . . . that adultery must be proved with the same degree of strictness as is required for proof of a criminal offence and I limit my observations to cases of adultery." In *Fairman v. Fairman* [1949] P. 341 the issue before the court was the same as in the *Ginesi* case. In the Divisional Court of the Probate, Divorce and Admiralty Division, Lord Merriman said (at p. 343): "That brings me to *Ginesi v. Ginesi* in which the Court of Appeal examined a *dictum* of my own (indeed, I think it is more than a *dictum*) . . . in *Churchman v. Churchman* . . . I would like to add a footnote to the phrase which I then employed, and say from the beginning of my tenure of this office I have always directed juries and directed myself in the same terms where there was a charge of adultery. I did so on the basis that adultery was a quasi-criminal offence, and that, therefore, the same principles should be applied to that charge as in the case of criminal offences properly so called: I am not conscious, however, that I have ever directed either myself or a jury that the same strictness applies to other matrimonial offences, such as desertion or cruelty or, for that matter, wilful neglect to provide reasonable maintenance, although there should be a direction that the onus lies upon the spouse who makes the charge to satisfy the court that the offence is proved."

From these authorities it appears that only adultery as a matrimonial offence to lead to a divorce must be proved with the higher degree of proof, and support for this statement can be found in *Davis v. Davis* [1950] P. 125. In that case both parties sought a divorce, alleging cruelty against each other. Barnard, J., dismissed both the petition and the cross-prayer, applying the statement of Lord Merriman in the *Churchman* case. Only the husband appealed and he did so successfully, for the Court of Appeal held unanimously that cruelty as a matrimonial offence did not require to be proved with the higher standard of proof. The judgment of Denning, L.J. (as he then was), is, as usual, full of interest. He places all the matrimonial offences on the same basis, with no higher proof required for adultery. He rightly reminds the court of the *Mordaunt* case and (at p. 128) reminds us of the exact words of s. 4 (previously s. 4 of the Matrimonial Causes Act, 1937, which in turn replaced s. 178 of the Judicature Act, 1925, and s. 31 of the Matrimonial Causes Act, 1851): "I should have thought that the statute itself lays down a sufficient test by requiring the court to be 'satisfied on the evidence that the case for the petition has been proved.' That puts the burden of proof on the person who makes the allegation, but it is not a burden of extraordinary weight. It is a burden which exactly accords with Lord Stowell's general rule in *Loveden v. Loveden* (1810), 2 Hag. Con. 1 (at p. 3): 'The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.' That was the rule of the ecclesiastical courts . . ."

Cases against requiring strict standard of proof for adultery

In *Gower v. Gower* [1950] 1 All E.R. 804 the Court of Appeal (Bucknill and Denning, L.J.J.) were faced with the simple issue of the standard of proof required for adultery. Bucknill, L.J., remarks (at p. 805): "He [wife's counsel] said that adultery is a quasi-crime and must be proved as such. I have never quite understood what that meant." He concludes that in the *Gower* case the alleged adultery had been proved, whatever standard of proof was adopted. Denning, L.J., attacks the *Ginesi* ruling upon five different grounds and suggests that it is contrary to reason and authority to place adultery in a different category. Our inquiry is not complete until we observe the later cases of *Hodgkins v. Hodgkins* [1950] P. 183; *Bater v. Bater* [1951] P. 35, and *Preston-Jones v. Preston-Jones* [1951] A.C. 391. In the *Hodgkins* case a husband petitioned for a nullity decree on the ground of his own impotence. The importance of the case for us is the statement by Bucknill, L.J., when he said (at p. 187): "... it would be impracticable and unreasonable to say that a higher standard was required in the case of nullity than in that of divorce," and his approval of a statement in a nullity suit of *C. (or se. H.) v. C.* [1921] P. 399, at p. 400, by Lord Birkenhead (sitting as a judge of first instance in the Probate, Divorce and Admiralty Division), who remarked: "The petitioner must remove all reasonable doubt..." In the *Bater* case the precise point for the Court of Appeal was whether the trial judge had misdirected himself by stating that the wife petitioner must prove the cruelty alleged against her husband beyond reasonable doubt. Bucknill, Somervell and Denning, L.J.J., agree that that was no misdirection, but Denning, L.J., observes (at p. 38): "If, however, the commissioner had put the case higher and said that the case had to be proved with the same strictness as a crime is proved in a criminal court, then he would, I think, have misdirected himself, because that would be the very error which this court corrected in *Davis v. Davis*."

In the *Preston-Jones* case the husband petitioned for divorce, alleging that a child born to his wife was not his and that in consequence she had committed adultery. The case has been of tremendous interest to the medical and legal professions

because of the long period of gestation present in the case. Its interest for us is on the point of the standard of proof. Lord Simonds said (at p. 400): "A question was raised as to the standard of proof. The result of a finding of adultery in such a case as this is in effect to bastardise the child. That is a matter in which from time out of mind strict proof has been required." Lord Oaksey said (at p. 409): "In such circumstances the law, as I understand it, has always been that the onus upon the husband in a divorce petition for adultery is as heavy as the onus which rests upon the prosecution in criminal cases." Lord MacDermott said (at p. 417): "... I am unable to subscribe to the view which, though not propounded here, has had its adherents, namely, that on its true construction the word 'satisfied' is capable of connoting something less than proof beyond reasonable doubt."

Conclusion

It is essential to consider what results can be drawn from all these authorities. It would appear that the statement of Lord Merriman in the *Fairman* case is a serious limitation on the unqualified *dictum* he made in the *Churchman* case and represents his view of our problem. Furthermore, that we have in *Ginesi* and *Gower* two decisions of the Court of Appeal which are self-contradictory. Finally, that if the above statement of Lord MacDermott is the correct law for all divorce petitions, then the rule with which we began our inquiry has disappeared. In connection with that statement it does appear that Lords Simonds and Oaksey were speaking with reference to an allegation of adultery against a wife which necessarily meant that her child would thereby be illegitimate. If that is a correct interpretation of their views then it is understandable that that type of adultery case should require a higher standard of proof. If Lord MacDermott's words are inapplicable to all divorce suits, then the eventual result might be that: (a) all matrimonial offences require only the lower standard of proof adopted in the majority of civil actions; (b) adultery if it means that a child is bastardised requires proof beyond all reasonable doubt. It is odd that such a fundamental problem should in 1959 be unsettled. Surprisingly, it was not dealt with by the Royal Commission on Marriage and Divorce (Cmd. 9678).

W. W.

"THE SOLICITORS' JOURNAL," 2nd APRIL, 1859

ON the 2nd April, 1859, THE SOLICITORS' JOURNAL wrote: "The City of London is now the scene of a contest such as, fortunately, does not often occur in England. There is a vacancy in the judgeship of the Sheriffs' Court, the filling up of which depends upon the voting of the majority of the Common Council; and several gentlemen are in the field as candidates for the office... Almost as soon as the public were aware of the death which caused the vacancy, Mr. Anderton announced, at a meeting of the Common Council, that he had already been pestered with numerous written applications for his vote. Immediately afterwards paragraphs appeared in the morning journals eulogising one or another of the candidates... It seems that even the tumultuous excitement of public meetings has not been

wanting to awaken enthusiasm in favour of at least one of these gentlemen... By the time... that the Corporation Reform Bill is fairly matured... it is not impossible that the power of election now vested in... the Common Council may be transferred to a very much larger number of persons... If public demonstrations and newspaper squibs are necessary to enable common councilmen to arrive at a rational and honest conclusion as to the fitness of a proposed judge, probably candidates under the new régime will not consider it imprudent to call in the aid of beer and bands of music. Indeed, assuming the principle to be right, there is no reason why all the machinery of ordinary contested elections should not be brought into play on such occasions."

NEW QUEEN'S COUNSEL

The Crown Office announced recently that the following had been appointed to the rank of Queen's Counsel: Professor Emlyn Capel Stewart Wade, Sir Kenneth Owen Roberts-Wray, K.C.M.G., Travers Christmas Humphreys, Neville Major Ginner Faulks, M.B.E., T.D., Lionel Alleyne Blundell, William Lloyd Roots,

Charles Edward Scholefield, Nigel Sebastian Sommerville Warren, Gwynfor Rhyse Francis Morris, Malcolm John Morris, Dimitry Tolstoy, Cyril Lewis Hawser, Samuel Knox Cunningham, George Ronald Rougier, Peter Anthony Grayson Rawlinson and Edward Davies Sutcliffe.

CAKES AND ALE: THOUGHTS ON *SHARKEY v. WERNHER*

WHEN the House of Lords gave its decision in *Sharkey v. Wernher* [1956] A.C. 58 (H.L.); 36 T.C. 275; 99 Sol. J. 793, it was realised that, although the facts of the case were unusual, a principle of very wide application was involved. Lady Zia Wernher carried on two distinct activities: one of them was a stud farm, which constituted the trade of farming and was assessable to tax under Sched. D, while the other was a racing stable, a non-trading activity which did not give rise to any taxable profits. In the year in question, Lady Zia transferred five horses from her stud farm to the racing stable, and the problem before the courts was to decide what sum should be credited to the farming accounts as a result of the transfer.

It seems that the stud farm was carried on mainly for the purpose of breeding horses for the racing stable, but although this fact is mentioned in some of the judgments, it does not appear to have influenced the decision.

Cost or market value?

It was conceded that some figure should be credited in the accounts of the stud farm, and the taxpayer contended for the cost of breeding the horses, while the market value of the horses, which was a considerably higher figure, found favour with the Crown. Vaisey, J., considering himself bound by an earlier decision in *Watson Bros. v. Hornby* [1942] 2 All E.R. 506; 24 T.C. 506, found in favour of the Crown; he was unanimously reversed by the Court of Appeal, whose decision was in turn reversed by a majority of four to one in the House of Lords. On this difficult and important point four judges in all were against and five in favour of the final decision, which, we shall respectfully suggest, was not an altogether satisfactory one.

The case of *Watson Bros. v. Hornby* (*supra*) had been decided by Macnaghten, J., on very similar facts, except that the livestock were day-old chicks valued in pence, instead of yearling colts and fillies valued in thousands of pounds, and that the market value of the chicks was, by some mischance, less than the cost of producing them. The second activity of the taxpayer in *Watson's* case was not, of course, a racing stable: it was a farm which, as the law then stood, was assessable only under Sched. B, while the hatchery from which the chicks were transferred was a separate business and its profits were taxed under Sched. D. It apparently makes no difference to the principle whether what one might call the "transferee activity" is taxable or not.

On these facts it was to the interest of the taxpayer to assert that only the market value of the chicks should be credited in the hatchery accounts, and to the interest of the Crown that the appropriate figure should be the cost of production. Macnaghten, J., decided in favour of the taxpayer, and the Crown must have humbly recognised the error of its argument, because in *Sharkey v. Wernher* we find the Crown dutifully arguing the other way round and contending for the market value, which in that case happened to be higher than cost.

Trading with oneself

In the House of Lords, Viscount Simonds began by asking why it should be necessary for any figure at all to be credited in the accounts of the stud farm, there being a well known principle that a man cannot trade with himself: "For I

cannot escape from the obvious fact that it must be determined whether and why a trader, who elects to throw his stock in trade into the sea or dispose of it in any other way than by way of sale in the course of trade, is chargeable with any notional receipt in respect of it, before it is asked with how much he should be charged . . . the same problem arises whether the owner of a stud farm diverts the produce of his farm to his own enjoyment or a diamond merchant, neglecting profitable sales, uses his choicest jewels for the adornment of his wife, or a caterer provides lavish entertainment for a daughter's wedding breakfast. Are the horses, the jewels, the cakes and ale to be treated for the purpose of income tax as disposed of for nothing or for their market value or for the cost of their production?"

After considering the authorities, Viscount Simonds came to the conclusion that the taxpayer had rightly conceded that some figure must be credited in the accounts. The proposition that a man cannot trade with himself must be qualified for this purpose, because a trader's accounts could not properly be made up to show his profits unless the accounts were credited with a figure in respect of goods diverted to his own use.

The question then remained, what figure? In the opinion of Viscount Simonds the only logical way of dealing with the transfer was to treat it as having been made by way of trade, and to ascribe to the article transferred its market value. There was no justification for the alternative of the cost of production, the unreality of which would be plain to a taxpayer if the cost of production were to exceed the market value.

Lord Radcliffe supported the market value, not because he thought it more real "in a situation where everything is to some extent fictitious," but because, first, it gave a fairer measure of assessable profit as between one taxpayer and another, and secondly it was better economics to credit the realisable value, it being the trader's own choice that he had appropriated value to himself as an alternative to realising it. The other two law lords supporting the majority did not give reasons.

Lord Oaksey based his dissenting judgment on two long-established principles of construction. The first was that the "profits or gains" taxed by the Income Tax Acts, whether in the case of farming or any other trade, were actual commercial profits, and the second that a man cannot trade with himself in the sense in which the word "trade" is used in those Acts. Lord Oaksey would have allowed the cost of production only.

A different approach

The argument in favour of the cost of production seems to have proceeded mainly on these lines—the cost would have been debited as a trading expense, and when the horses were transferred, otherwise than by way of trade, it was necessary to write back the cost of production which no longer represented a trading expense. Viscount Simonds dismissed this argument with the fine phrase that it merely "adds to a fictional receipt a false attribution of expenditure," and Lord Radcliffe thought there was no justification for a cancelling entry of this sort.

But the short dissenting judgment of Lord Oaksey, although finally adopting the above argument, suggests a different approach when he says that traders who get rid of assets without selling them "must credit the figure at which the

assets stand in their accounts or the profits of the account will be improperly diminished by the amount entered in the account as the value of the asset." Surely the proper reason for crediting Lady Zia's stud farm accounts with the cost of breeding the yearlings would be, not to cancel the debit for the expenses, but to remove from the total of current assets the figures at which those yearlings stood. In the same way stock-in-trade destroyed by fire would be removed from the accounts by crediting the figure at which it stood.

If this approach had been adopted it would have been possible to limit Lady Zia's credit to the cost of breeding, without overruling *Watson Bros. v. Hornby* (*supra*), for the simple reason that stock is normally valued in trading accounts at the lower of cost or market value. If the credit to be made on transfer of an article were regarded as an adjustment of the stock figure, then the credit would also be the lower of cost or market value. This would secure a fair result in all cases, and would avoid the unreality, which Viscount Simonds feared would be so plain, of adhering to cost when cost is higher than market value.

The caterer's daughter

The actual decision of the House of Lords usually favours the Revenue, and when a grocer removes a pound of bacon from his shop to his kitchen the inspector says, "Ah, Lady Zia Wernher's racehorses," and insists that the market price of the bacon be credited in the grocer's accounts. Sometimes attempts are made to extend the principle to the provision of services, but this should be resisted. It is true that Viscount Simonds mentioned the caterer's daughter, but he did not suggest that anything should be charged but the cakes and ale.

The familiar case of the hotelkeeper, who provides himself with board and lodging, should not be dealt with on the analogy of *Sharkey v. Wernher*, and there is no warrant for bringing into the hotel accounts the letting value of the rooms. The absurdity of applying such a principle to services can be seen by taking the case of a solicitor. If a solicitor skilfully guides himself through a private problem (which is admittedly unusual) is he to charge himself a fair and reasonable fee for the advice, after giving full weight to all the seven matters mentioned in the new Sched. II?

J. P. L.

SHOPS AND PARTS OF SHOPS

THE Shops Act, 1950, has now been law for nearly ten years, and that statute was itself a consolidating measure going back to the Shops Act, 1912. Nevertheless, the courts have twice in the last few months had to decide what is—or what is not—a shop for the purposes of the Act. First, in *Stone v. Boreham* [1958] 3 W.L.R. 209 the Queen's Bench Division held, following *Eldorado Ice Cream Co. v. Keating* [1938] 1 K.B. 715 (the box-tricycle case), that a vehicle was not capable of being a shop for the purposes of the Sunday closing provisions of the 1950 Act; a shop must be "premises."

Now comes *Fine-Fare, Ltd. v. Brighton Corporation* [1959] 1 W.L.R. 223; p. 179, *ante*, concerned with the early closing provisions of the Act, in which the prosecuting local authority argued that separate parts of one premises, whereon a mixed business was conducted, were each separate shops. The Brighton Corporation had made early closing orders under the predecessor of s. 1 of the 1950 Act, specifying Wednesday as the early closing day for certain classes of shops, and for a smaller class of shops specifying Thursdays as the early closing day. The appellants' mixed shop had four major trades, namely, (1) a grocer, tea dealer and provision merchant; (2) a fruiterer, greengrocer and florist; (3) a fishmonger and poulterer, and (4) a butcher; they also carried on, on a small scale, other trades including a domestic hardware merchant, stationer, confectioner, baker, tobacconist and seedsman. The appropriate early closing day fixed by the local authority's orders for trades (1) to (4) was Wednesday; in yet another order dealing with towels and sheets, etc., the early closing day was Thursday. The appellants closed the whole of their shop on Thursday in every week; they were prosecuted for not closing the four "shops" or portions of the shop dealing in trades (1) to (4) on Wednesdays.

In giving judgment in favour of the appellants the Lord Chief Justice pointed out that the first question was, what is a "shop"? Can it mean a department within the premises or, indeed, a counter in the department? "I think it is clear that where you get a single hereditament consisting of self-contained premises laid out with counters as shown on the plan, the whole of those premises constitute the shop,

and that it is impossible to say that any particular part of those premises or any particular counter constitutes a shop." Having concluded that the premises were but one shop, the Lord Chief Justice then proceeded to follow two Scots decisions (*Patrick Thomson, Ltd. v. Somerville* [1917] S.C. (J.) 3, and *MacDonald v. Groundland* [1923] S.C. (J.) 28) and to hold that, except where an early closing order expressly in terms applied to a "mixed shop," such a shop was outside the terms of the order. Perhaps it might have been more logical for the opposite view to have been held, namely, that the several parts of the shop should have been closed on the specified day or days, but as the Lord Chief Justice pointed out, the two Scots decisions were given in 1917 and 1923, and since then Parliament had considered the whole matter and passed the 1950 Act, using the same language as that in the Act of 1912. A Scots decision should be followed in such a case.

Two points must at once be pointed out: (a) that any retailer may choose to close on Saturday as an alternative to the day specified for his class of shop in the local authority's closing order. This will be of value to him, of course, only where other shops in the neighbourhood close on Saturdays. In all but the "West end" areas of large cities, Saturday is the best trading day in the week, and the extension of the five-day week among factory and office workers is likely to make Saturdays even busier for retailers. (b) The decision is of relevance only where an early closing order or orders has or have been made by the local authority. If no order has been made, it is open for the retailer to select his own early closing day, but he must specify that day in a notice affixed in his shop (there is no form prescribed for this notice), and he may not change the day oftener than once in any period of three months (s. 1 (3)). In passing it should be noticed that a retailer cannot change the day he has selected one week and then change back again the next week, so as, for example, to get the benefit of the two Christmas public holidays; this amounts to two changes: *Owen v. Parry* (1914), 79 J.P. 64.

Further, this decision does not apply to the special kind of "mixed shops," contemplated in the provisions of the Act

dealing with Sunday trading (Pt. IV) ; here the shop may be kept open for some trades only (see s. 50). The rules as to the employment of shop assistants—on half-days and on Sundays—also are different. The early closing day need not necessarily be the same day as that on which the employer permits his assistants to have a half-holiday—but that day must be specified in a notice in the prescribed form posted in the shop (see s. 17 (2), and the regulations dated 1st April, 1912, made by the Home Secretary under the Shops Act, 1912, S.R. & O., 1912, No. 316).

To return to the *Fine-Fare* case, it seems then that a "mixed" shop is outside an early closing order made by the local authority, in any case where the trades carried on are wider than the class of shop covered by the particular early closing order. If the order itself covers mixed shops of the kind in question (in *Patrick Thomson, Ltd. v. Somerville*, the Lord Justice-General clearly indicated that an order might specify an early closing day for shops "where a number of different trades or businesses are carried on"), then obviously it must be complied with, but otherwise it may be ignored. This does not mean, however, that a mixed shop is not subject to the early closing requirement at all, because s. 1 (1) clearly applies to *all* shops, requiring them to close "for the serving of customers" (shop assistants may of course be there employed "in or about the business of the shop," as above stated) "not later than one o'clock in the afternoon on one week day in every week"; and "week" here means "the period between midnight on Saturday night and midnight on the succeeding Saturday night" (see s. 74 (1)). The effect of the *Fine-Fare* case is, therefore, that the proprietor of a "mixed shop" can, subject to the terms of an order expressly applying thereto, choose his own early closing day, and he is not confined to a choice between a day specified by the local authority and Saturday. Such a proprietor will,

however, still have to comply with s. 1 (3) as to notice and not change his mind more than once in three months (*supra*).

The Shops Act is quite unnecessarily confusing. The Lord Chief Justice said he had "very great sympathy with any shopkeeper who has occasion to consider this Act, and, indeed, perhaps the only people who benefit out of it are the members of the legal profession." With respect, we are by no means sure that obscure wording in a statute is ultimately of any great benefit to the legal profession as a whole, as it is the blots on our jurisprudence of this kind that cause the law and those who follow its calling to fall into disrepute. It is to be hoped that when Parliament turns to deal with mobile "shops," which are exempt from the Shops Act, from local rating and from some provisions of the Food Hygiene Regulations, that the opportunity will also be taken to deal with this particular problem of mixed shops. As the Shops Act is now interpreted, in many respects it operates as an obstacle to the independent small trader as against his competitors, the "multiples" and the chain stores. The remedy, at least on this particular matter, would seem to be for Parliament to provide that early closing orders shall be made by every local authority, and for them to so draft their orders as to cover mixed shops. The simplest method of so doing would be no doubt for the authority to fix only one early closing day for all trades. If this proves to be impracticable (for example, because the butchers wish to close on Mondays), a special clause in the order could specify one-or other-day for the mixed shops.

Yet another solution would be for the early closing—both as to half days and evening closing—provisions to be repealed completely. The times when shops were kept open for twelve and more hours a day are past, and the economics of modern retail trading and the influence of the trade unions would ensure that shop hours were reasonable.

J. F. GARNER

Landlord and Tenant Notebook

INTENTION AND SINGLE-MINDEDNESS

THE appeal in *Espresso Coffee Machine Co., Ltd. v. Guardian Assurance Co., Ltd.* [1958] 1 W.L.R. 900; 102 SOL. J. 601; [1959] 1 W.L.R. 250 (C.A.); p. 200, *ante*, has been dismissed; but something may be added to the discussion of the decision at first instance to be found in the "Notebook" for 16th August, 1958 (102 SOL. J. 593).

The essential facts were as follows. In September, 1957, tenants of business premises held under a lease due to expire in March, 1958, made a request for a new tenancy under Pt. II of the Landlord and Tenant Act, 1954. The landlords notified their intention to oppose any application on the ground that, at the termination of the current tenancy, they intended to occupy the holding for the purposes of a business to be carried on by them therein. The tenants issued an originating summons in January, 1958. At about that time, the landlords heard of the reconstruction of a war-damaged building in the same neighbourhood, which "might be even better" than that provided by the demised premises, and entered into "negotiation, in some sort" with its owners.

On 19th February the general court of directors of the landlord company passed two resolutions: one, that in the event of their obtaining possession of the demised premises they would as soon as practicable perform all necessary works and

then take up occupation; the other, that their counsel be authorised to give the court an undertaking to that effect. On 11th March their deputy general manager/secretary swore an affidavit stating that they had definitely decided to occupy the demised premises for the purposes of their business, and that those premises were greatly more suitable for their business than the other premises.

The summons was heard by Harman, J., on 27th June, and the respondents may be said to have scored their biggest hit when the aforementioned deputy general manager answered the following question in cross-examination (reported at [1959] 1 All E.R. 458, at p. 461): "If the situation arises that you cannot get possession of No. 227 [the subject of the application] until some date between November and February next, would you agree with me that obviously your board would then have to re-address its mind to this question, and decide whether it wished to go ahead with moving into No. 227 first, and then out and into No. 199 [the other premises]?" Answer: "Yes, I would agree with you that they would have to re-assess the position, but, of course, we have not yet signed the contract for the lease of No. 199, so we do not really know the exact terms of that." Despite which the learned judge found for the respondents, and the position was

succinctly expressed by Lord Evershed, M.R., in the Court of Appeal in these terms ([1959] 1 W.L.R., at p. 256): "The question is: Was the judge entitled to find as a fact (as he did) that at the date of the hearing before him—27th June, 1958—the landlords did intend to occupy these premises and get into possession for their own business? And, I think, for reasons which I have stated, that the judge was amply justified in so concluding."

The reasons

An examination of these suggests that there were considerations of two kinds. There was the evidence manifesting a firm, fixed and real intention (the adjectives used by Lord Evershed, M.R.), or an honest, present and real intention (those selected by Harman, J.; approved by Lord Evershed, M.R.): "I do not think that he left out any characteristic which he should have borne in mind." Romer, L.J., made it "real, fixed and settled." And there was the fact of the offer of an undertaking.

The tenants had sought to cast doubt on the reality of the intention in this way: The landlords, they pointed out, had not abandoned the negotiations for No. 199. As the learned Master of the Rolls pointed out, however, if they had pinned their hopes on that building, they might in the end have got neither. An intention to occupy No. 227 was not inconsistent with still pursuing negotiations as regards No. 199—bearing in mind the vital date. It will be recalled that *Betty's Cafés, Ltd. v. Phillips Furnishing Stores, Ltd.* [1958] 2 W.L.R. 513 decided (Lord Keith dissenting) that the relevant date on which the quality of intention has to be decided is that of the hearing, and that the decision must be made by reference to the material before the court on that date.

It was in the course of the same case that the idea of offering an undertaking was first conceived; at first instance, Danckwerts, J., said that such an undertaking "compelled fixity of intention." And Romer, L.J., said, in his judgment in the *Espresso* case, that he knew no better way of describing it.

Interim continuation

The question put in cross-examination to which I alluded above was one put against the background of the Landlord and Tenant Act, 1954, s. 64. By this section, when, *inter alia*, a request has been made for a new tenancy under Pt. II and the effect would be termination of the tenancy before the expiration of three months from the date when the application is finally disposed of, the tenancy is extended by three months; and "the date on which it is finally disposed of" means the earliest date by which the proceedings on the application (including any proceedings in consequence of an appeal) have been determined and any time for appealing or further appealing has expired, etc." (s. 64 (2)). And, at first instance, it had been argued on behalf of the tenants that when passing the resolution the landlords' board of directors had not, as Harman, J., put it, realised to the full the expedients to which they might be subjected by the tenants: if they had really thought about it, they would have realised that they could not get possession that year, or at any rate not till the very end of the year; and that the resolution was consequently valueless. The learned judge declined to accept that view: the "at the end of the current tenancy" meant whenever that happened to be. (It is only in the judgment at first instance that the fact that the "at the end of the current tenancy" was part of the resolution is mentioned; and in that judgment, the date is given as "March, 1958.") In the Court of Appeal, Lord Evershed, M.R., dealt with the point by saying that the

truth was, as Harman, J., had found, that the landlords had made up their minds to go into possession, come what might.

As a matter of interest, the Court of Appeal refused leave to appeal to the House of Lords.

The effect of the s. 64 provision on the term for which a new lease will be ordered has since been illustrated by *Re No. 88 High Road, Kilburn*, p. 221, *ante*.

Contingencies

I do not think that the new decision can be taken as authority for the proposition that whenever a landlord negotiates for other premises he may yet be able to establish the necessary intention to occupy those held by his tenant. It may not be necessary to show (as was stated in the deputy general manager's affidavit) that the demised premises are more suitable than those the subject of negotiation; for when, as Lord Evershed, M.R., put it, a new star was first seen in the firmament in January, 1958, that star fascinated the landlords because here would be a new building which might even be better than the demised premises. So I suggest that, even if the new building had appeared more suitable instead of less suitable for the landlords' purposes in June, they could, especially if prepared to give the undertaking, have succeeded. The judgment uses various metaphors—besides the new star in the firmament, there are references to the pinning of hopes, and to having one's bun and one's penny—and to express my point, I would recall the "bird in hand worth two in the bush" adage.

But if matters were so advanced that the other premises, being more suitable, were within the landlord's grasp, it might be difficult for him to establish intention to occupy those demised, even with the help of an undertaking. And I will conclude with some observations on the value of such undertakings, which has not yet been fully demonstrated.

Undertakings

As mentioned, it was in *Betty's Cafés, Ltd. v. Phillips Furnishing Stores, Ltd.*, *supra*, that the device was first employed. The intention in that case was an intention to reconstruct, not to occupy; and on the fourth day of the hearing at first instance the landlords' board of directors passed a resolution resolving that the work be carried out, etc., and authorising counsel to give an undertaking either to the court or to the tenants that they would be carried out as soon as was practicable in the event of possession being obtained. When the case was remitted by the Court of Appeal (the decision on relevant time being held to be erroneous), Danckwerts, J., required that the undertaking be given to the court, saying, as mentioned above, that it compelled fixity of intention; and added, "if that undertaking were neglected or broken, consequences of a serious nature, which would involve perhaps sequestration of the company's property and possibly the sending of the directors responsible to gaol, provide that the fixity of purpose remains and is duly carried out." In an unreported case, *Lennox v. Bell*, an undertaking was refused because the person offering it could not be expected to be able to carry it out; in the *Espresso* case it was emphasised that they could.

But I italicised the "remains and is duly carried out" because, in my submission, there is a difference between an undertaking to demolish and reconstruct and an undertaking to occupy for the purposes of one's business; and in *Fisher v. Taylor's Furnishing Stores, Ltd.* [1956] 2 Q.B. 78 (C.A.) (an internal reconstruction case), Denning, L.J., observed that the successful landlord might "honestly" change his mind

afterwards. This suggests an analogy between continuing and once-and-for-all obligations so important when questions of waiver of forfeiture arise. When is an intention to occupy for the purposes of one's own business "duly carried out"? There could, indeed, have been no suggestion, in the *Espresso* case, that the landlords were not concerned with securing

permanent accommodation; but the evidence may not always be so cogent.

Circumstances may also arise, I suggest, in which it may be necessary to seek a release from such an undertaking; e.g., if before the end of the tenancy (as defined) premises are destroyed by fire.

R. B.

HERE AND THERE

INSIDE AND OUT

AFTER the war there was much talk about the Leisure State, which is apparently a sort of corollary to the Welfare State, or perhaps the next station down the line, but there seems to be a good deal of vagueness about what sort of a landscape will greet us at the platform gates, or who will carry our bags. One gathers a strong impression that "leisure" does not mean now what it did to our ancestors, whether they walked the studious cloisters pale or stood in groups under the dreaming garden trees. Leisure now seems to be generally conceived as either some form of restless activity, provided it is profitless, or else the contemplation of restless activity in others, seen from the grandstand or on the television screen. Of course there have always been people whose idea of relaxation was thumping pianos or blowing bagpipes or linking arms to dance at the "Bull and Bush," and very nice too—more sociable and human, as well, than squinting at little moving pictures in a darkened room or packing oneself into a tiny mechanical cottage that hurls itself down to Brighton at the speed of a cannon ball. But in the intervals and by way of contrast it was still a recognised and accepted pleasure to stand and stare or sit and think or just to sit. Now, however, leisure is positivist; it must be filled with the tangible, the palpable, the externally apprehensible. And if leisure requires the elaborate apparatus of deliberate activity, how much less can work be acknowledged to be compatible with stillness, seclusion and contemplation. And yet it is only from within the mind that the external world of men is changed. From the mind and from the emotions come words and actions, murders and revolutions, cathedrals and office blocks, pictures and power stations; they all start quite quietly inside.

LET IT ALONE

Now, though the law, like everything else that human beings have built or achieved, rests on ideas and abstractions and not on a mere apparatus of policemen and bailiffs and writs and men in wigs, it very wisely confines its operations to what is tangible and external. We have not yet evolved a "Thought Police," but not because we assume that there is no thought, and in the sort of times in which we are living it is significant to note that the law recognises that there may be uses of land undreamt of in the philosophy of tax officials, local authorities and men from the Ministry with little books of regulations, for the Judicial Committee of the Privy Council has lately declared, through the mouth of Lord Denning, that in order to use land you do not have to be doing something to it or on it. You may be using your land and still leaving it quietly alone. The question arose because a local authority

in New South Wales wanted to levy rates on 291 acres of virgin bush, unfenced, heavily timbered, intersected by steep gullies. This wild place was owned by a hospital and the local authority contended that it was not "used or occupied by the hospital . . . for the purposes thereof" so as to be exempt from rates under the terms of a statute. But the Committee held otherwise. The land, they held, was used to secure the patients peace and quiet and fresh air; it was used as a *cordon sanitaire* against the approach of factories and houses. A man who wished to preserve an island as a bird sanctuary, said Lord Denning, would be using it even though he did nothing in relation to it but keep out trespassers and prevent building.

ENOUGH IS ENOUGH

It is amusing to think how puzzling, and indeed unmeritorious, the conception of the use of "unused" land must seem to all the industrialists, estate developers, atomic researchers and compulsory purchasers who carry so much weight with the planning authorities, because "productivity" is the current fashion, the production of more and more tangible objects, forgetting the old earthy wisdom of the Victorian music halls:—

"The more you have the more you want, they say,
But enough is as good as a feast, any day."

And what no one has enough of now, in the scramble for more and more mere things, is peace and quiet, the chance to stand and stare and the inner tranquillity to want to. But to return to the "use" of land, among men with free will and free minds and free instincts the true use of land is to enjoy it, just as the true use of your friends is to love them and enjoy their company, not to exploit their usefulness. Nor is it the proper use of land. It was by a sound instinct that the old legal phraseology links the "use" of the land with its "enjoyment." In a civilised community nothing but the sharpest crisis of survival should divorce them. Is it a crazy paradox to say that Winfrith Heath in Dorset was far more enjoyable to everyone in the county before the atomic research station was planted there? Or that the Fawley Refinery, where wheat used to grow not long ago, has detracted from the enjoyment of everyone within sight and sound of it over a wide tract of Hampshire? In such high matters is it hard for the individual to weigh the obvious and undoubted loss of enjoyment against the conjectural necessity which is supposed to justify it? National survival might impose such a melancholy necessity. For mere greed it is intolerable. Enough is enough. Contentment is within and not in all the fussy distracting apparatus of Subtopia.

RICHARD ROE.

Personal Notes

Mr. F. C. Backway, town clerk of Bideford, retired recently after twenty-five years in office.

Col. A. W. Turnbull, clerk to the justices in Shropshire, retired on 31st March after twenty-two years in office.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of "The Solicitors' Journal"]

Plea for Beneficence in Stepney

Sir,—Some people think that to-day voluntary social service is no longer necessary when the State and local authorities have taken over so much that in an earlier day fell to voluntary service. This is far from the truth, and especially in urban areas there is still a great deal of work depending on the goodwill of the private citizen.

I have recently been approached by those concerned with work in the East End of London where there is a great need. Although no exact estimate is possible it is their view that probably some 500 men and women are giving voluntary service in various ways, but there is need for many more. It seems to-day that there is work for another 250 or 300.

The fields of work are various and include clubs for boys and girls, scouts and guides, handicapped children, school care committees, clubs for the aged and visiting the house-bound, taking round meals, help with the blind, sick and mentally handicapped, hospital services.

People ready to give even a few hours a week to help in this vital work are wanted, not specialists but men and women of goodwill. Men probably can spare time only in the evening, but other members of their families may have time by day. There is work of all sorts to be done, from personal contact with the needy to sorting out clothing and typing letters.

Stepney is a neighbour alongside the City of London and it is a fact that the City to-day as in the past owes some of its efficiency and wealth to the services of its easterly neighbours. To-day virtually all working in the City speed away to distant homes, but I believe there must be among all these thousands a few who would delay their home-going, say, once a week to help our neighbours in need. I know that there are those who are doing it, and finding deep satisfaction in their gift of service. Therefore, I do not hesitate to ask others who are moved to help to communicate with the Warden of Toynbee Hall, Commercial Street, E.1, where offers will be gratefully received and passed to the various branches of service in need.

I trust that all heads of firms will bring this appeal for help to the notice of those in their employ so that it may be known as widely as possible.

S. H. GILLET,
 Lord Mayor.

The Mansion House,
 London, E.C.4.

Sale of Flick Knives

Sir,—The introduction in Parliament of a Bill on the subject, and the recent conjectures on the likelihood of the Bill being passed by both Houses, prompt me to put forward the following argument (albeit with some reserve) as to the present state of the law.

A person who buys a flick-knife or similar weapon from a shopkeeper, at a time when he has no lawful authority or reasonable excuse for being possessed of the same, surely commits an offence under the Prevention of Crime Act by thereupon emerging from the precincts of the shop into the street, provided of course that the street in question is not a private one. On this assumption it is not maintainable that the retailer who sells the article, when it is blatantly obvious that his customer is a potential offender against the Act, aids and abets any offence committed under s. 1 in so far as the latter must, after completion of the transaction, necessarily enter a public place carrying the object of his purchase with him?

I am not intending to go so far as to imply that the seller of weapons which are classified as "offensive" is by operation of law put upon positive inquiry as to whether or not his customer is making the purchase otherwise than for the purpose of becoming adequately "tooled up"; but in many instances the absence of a genuine need for a dangerous instrument must be highly conspicuous, and under such conditions an abetting of the offence is, to my mind, an inescapable inference.

Admittedly, we may here be concerned indirectly with questions of causation; and indeed if, for example, in the above circumstances, the purchaser were, upon coming out into the open, immediately to make use of his newly acquired prize by wounding or killing a passer-by no one could properly suggest that the seller would normally be liable as an accessory. In the example given, however, the sale of the article facilitates in itself the commission of a misdemeanour which, if my initial proposition is valid, occurs through the mere fact of the parties to the sale parting company, the intention of both of them, at the time, being that the buyer should have the weapon with him on leaving the shop.

I would be interested to learn the views of other readers on this topic.

London, W.9.

W. L.

POINTS IN PRACTICE

Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the "Points in Practice" Department, The Solicitors' Journal, Oyez House, Breems Buildings, Fetter Lane, London, E.C.4. They should be brief, typewritten in duplicate, and accompanied by the name and address of the sender on a separate sheet, together with a stamped addressed envelope. Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.

Acknowledgment in Assent for Probate

Q. Where a trust corporation and an individual are appointed executors and obtain probate of the will is it, in your opinion, advisable or appropriate for them in an assent in respect of freehold property in favour of the individual executor to acknowledge the individual's right to production of the probate? It appears to us to be entirely superfluous, but in discussing it with the trust corporation they put forward the view that if the acknowledgment is not contained in the assent then at some later period (often after several years), when the assentee is proposing to sell the property, application is made for an acknowledgment by the trust corporation in respect of the probate (the trust corporation and not the individual executor always retains physical possession of the grant). We do not see how this can be avoided for, even if the acknowledgment is incorporated in the assent, we hardly feel that a purchaser from the beneficiary would be satisfied.

A. We consider that a right to production should be obtained by the assentee so that the benefit of the right will pass to a purchaser from him. There is grave doubt, however, whether

the customary statutory acknowledgment is effective when given by two or more persons in favour of one of them. The statutory acknowledgment must be given "to another" (Law of Property Act, 1925, s. 64 (1)). The matter is discussed in Emmet on Title, 14th ed., vol. 2, pp. 471, 472. Consequently, our view is that the assent should contain an express covenant by both executors in favour of the individual as assentee. A precedent which can be adapted is to be found in Key and Elphinstone's Precedents, 15th ed., vol. 1, p. 707.

Revocation of Planning Permission—COMPENSATION PAYMENTS

Q. A client of ours who owns a freehold plot (the site of cottages demolished after bomb damage) applied, last year, to the local authority acting on behalf of the county council for outline planning approval for the erection of a house on the site, and this was granted, but the subsequent application for approval of detailed plans was refused and our client was successful in an appeal to the Minister. It is believed that the local authority contemplates making an order revoking the planning permission and will then compulsorily purchase the site for a redevelopment

So many great tragedies



This little chap is a spastic. That means that the muscle-controlling part of his brain was damaged at birth—a very great tragedy. All his life he will need extra sympathy, love and care, for it is unlikely that he will be able to speak or to move as easily as his more fortunate brothers and sisters. But even great tragedies can be lessened by relief. In this country alone there are 10,000 spastic children and their most urgent need is for skilful training and treatment so that their often greater-than-average potentialities can be fully realised.

The National Spastics Society is doing all it can to bring loving care (treatment, training and understanding) to spastics throughout the country. But there are still not enough facilities. That is why we urgently appeal to you to remind clients considering charitable legacies of the National Spastics Society. We must—in the name of common humanity—help the victims of this great tragedy to get on top of their physical handicaps, to develop their gifts and personalities and to live as happily as they can. Loving care costs money—we need *your* help.



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scheme. Our client has incurred considerable architects' and other fees in connection with the submission of detailed plans and for attendance at the successful appeal.

Has the Minister power, when asked in the statutory notice, to confirm a revocation order, on representation to the effect or at a hearing, to order that our client be given an indemnity by the local authority for these expenses? Or are these expenses to be claimed in addition to the purchase price when negotiations are taking place with the district valuer as to the consideration to be paid for the land when the application for confirmation of the compulsory purchase order is heard? In this connection the value of the site was agreed with the district valuer shortly before the application for outline planning approval was made, but this value is considered to have been enhanced by the grant of permission. Is the enhanced value equivalent to our client's expenses in obtaining approval? Do the bills in connection with these expenses require taxation or can a lump sum be ordered without submission of details? We assume that these costs can be recovered. Can you call our attention to the sections of the Town and Country Planning Act in point or other authority?

4. The payment of compensation on revocation of planning permission is regulated by s. 22 of the Town and Country Planning Act, 1947, as amended by s. 38 of the Town and Country Planning Act, 1954. If and when the revocation order is confirmed by the Minister a claim should be made under these provisions for the depreciation in the value of the land caused by the revocation and for the expenses referred to in the inquiry. If the compensation cannot be agreed it will fall to be determined by the Lands Tribunal. The claim should be made to the clerk of the local planning authority in writing (no form is prescribed) within six months of the date of the order (or such longer time as the Minister may allow) as required by reg. 4 of the Town and Country Planning (General) Regulations, 1948, S.I. 1948 No. 1380. When the land is to be acquired the compensation for its acquisition will be assessed on the new basis in the Town and Country Planning Bill now before Parliament, but it is not to be expected that so far as compensation is recovered under the sections mentioned above for depreciation in the value of the land it can be recovered again in the compensation for acquisition.

REVIEW

Bullen and Leake's Precedents of Pleadings in the Queen's Bench Division. Eleventh Edition. Edited by L. L. LOEWE, M.A., of the Middle Temple, Barrister-at-Law. Consulting Editors: R. F. BURNAND, C.B.E., O.B.E., Mil., M.A., Senior Master of the Supreme Court and Queen's Remembrancer, and I. H. JACOB, LL.B., a Master of the Supreme Court. 1959. London: Sweet & Maxwell, Ltd. 47 7s. net.

The art of pleading is mastered by very few lawyers—this is because it is left to specialists at the Bar and the general tendency nowadays is for pleading to be much looser than it was. This trend always follows a break up of hard and fast rules of procedure and practice, such as the forms of action which were abolished in 1875. But, as we know from Maitland, though they are dead they yet rule us from their graves; the rules of pleading in the Queen's Bench are still important—how important they still are can be seen from the most cursory examination of such cases as *Esso Petroleum Co. v. Southport Corporation* [1956] A.C. 218, or more recently *Warner v. Sampson* [1959] 1 All E.R. 120 and *Fowler v. Lanning* [1959] 1 All E.R. 290. In *Warner v. Sampson* one witnesses the interesting spectacle of a former editor of

Bullen and Leake, viz., Lord Denning, who edited the ninth edition in 1935, quoting extensively from the third edition of the work (1868) to see what the state of pleading was on a particular point before 1875. The latest edition has received careful attention and the editor is to be congratulated on having secured the services as consulting editor of Master R. F. Burnand upon the aspects of practice dealt with in Chaps. 1 to 5 and 8 and 9, and Master I. H. Jacob upon libel and slander and negligence. This latter subject has undergone tremendous development in recent years and practitioners are grateful to have the guidance of one so skilled as Master Jacob particularly upon statutory duty and fatal accidents. His help will be most valuable and one hopes that both masters will continue long in their consulting rôle as a link between, as it were, theory and practice. The work follows the familiar division into parts, the statement of claim in both contract and tort, the defence, replies and subsequent pleadings and particular defences in contract and tort. This famous work, now approaching its centenary (it was first issued in 1863), is still the repository of pleading wisdom in all actions in the Queen's Bench.

IN WESTMINSTER AND WHITEHALL

ROYAL ASSENT

The following Bills received the Royal Assent on 25th March :—

Angle Ore and Transport Company.
Consolidated Fund.
County Courts.
Electricity (Borrowing Powers).
Emergency Laws (Repeal).
Family Allowances and National Insurance.
International Bank and Monetary Fund.
Intestate Husband's Estate (Scotland).
Overseas Resources Development.
Transport (Borrowing Powers).

HOUSE OF LORDS

PROGRESS OF BILLS

Read First Time :—

Bucks Water Board Bill [H.C.] [25th March.
Solicitors (Amendment) Bill [H.L.] [25th March.

To make provision for an increase in the membership of the Disciplinary Committee constituted under section forty-six of the Solicitors Act, 1957.

Supreme Court of Judicature (Amendment) Bill [H.C.] [23rd March.
Town and Country Planning Bill [H.C.] [25th March.

Read Second Time :—

All Saints Chelsea Bill [H.C.] [25th March.
House Purchase and Housing Bill [H.C.] [23rd March.
Licensing (Scotland) Bill [H.L.] [24th March.

To consolidate certain enactments which relate to licensing in Scotland and to matters connected therewith, with corrections and improvements made under the Consolidation of Enactments (Procedure) Act, 1949.

Read Third Time :—

Building (Scotland) Bill [H.C.] [25th March.
Calvanistic Methodist or Presbyterian Church of Wales Amendment Bill [H.L.] [24th March.
Highways Bill [H.L.] [25th March.
Post Office Works Bill [H.L.] [18th March.

HOUSE OF COMMONS

A. PROGRESS OF BILLS

Read First Time :—

Ministry of Housing and Local Government Provisional Order (Colne Valley Sewerage Board) Bill [H.C.] [24th March.

To confirm a Provisional Order relating to the Colne Valley Sewerage Board.

Police Federation Bill [H.C.] [18th March.
To amend the provisions of the Schedule to the Police Act, 1919, with respect to the dates of elections of Branch Boards and of annual meetings of Branch Boards and Central Conferences of the Police Federation.

Read Second Time :—

Gloucestershire County Council Bill [H.L.] [23rd March.

Read Third Time :—

Colonial Development and Welfare Bill [H.C.] [25th March.

B. QUESTIONS LEGAL AID SCHEME

The ATTORNEY-GENERAL said that the Legal Aid and Advice Act, 1949, did not prevent an unassisted party from recovering any costs from an assisted person, but limited the amount recoverable to what was reasonable for the assisted person to pay in all the circumstances, including the means of both parties and their conduct in connection with the dispute. He was unable to forecast any amendment to those provisions in the Act and Regulations. [24th March.

PLANT AND MACHINERY (RATING)

Mr. HENRY BROOKE said that he was considering the important representations received relating to the rating of plant and machinery. Some difficult issues had arisen on which he was not yet in a position to announce a decision. He said that it would not be practicable to provide that a new Order should take effect from 1st April next as had been intended. [25th March.

STATUTORY INSTRUMENTS

Agriculture (Calculation of Value for Compensation) Regulations, 1959. (S.I. 1959 No. 496.) 8d.
Agriculture (Circular Saws) Regulations, 1959. (S.I. 1959 No. 427.) 6d.
Agriculture (Safeguarding of Workplaces) Regulations, 1959. (S.I. 1959 No. 428.) 6d.
Chester Water Order, 1959. (S.I. 1959 No. 425.) 5d.
Control of Borrowing (Amendment) Order, 1959. (S.I. 1959 No. 445.) 5d. See p. 243, *ante*.
Craven Water Board Order, 1959. (S.I. 1959 No. 433.) 11d.
Food Hygiene (Scotland) Regulations, 1959. (S.I. 1959 No. 413.) 8d.
Further Education (Grant) Regulations, 1959. (S.I. 1959 No. 394.) 6d.
Further Education (Local Education Authorities) Regulations, 1959. (S.I. 1959 No. 393.) 5d.
General Grants (Pooling Arrangements) Regulations, 1959. (S.I. 1959 No. 447.) 5d.
General Optical Council (Membership) Order of Council, 1959. (S.I. 1959 No. 412.) 4d.
Grass and Clover Seeds General Licence, 1959. (S.I. 1959 No. 460.) 5d.
Grass and Clover Seeds General Licence (Scotland), 1959. (S.I. 1959 No. 463.) 5d.
Isles of Scilly (Children Act, 1948) Order, 1959. (S.I. 1959 No. 432.) 5d.
Leicester Water Order, 1959. (S.I. 1959 No. 411.) 11d.
Live Poultry (Restrictions) Amendment Order, 1959. (S.I. 1959 No. 466.) 5d.
Local Education Authorities Recoupment (Primary, Secondary and Further Education) Amending Regulations, 1959. (S.I. 1959 No. 448.) 5d.
London Traffic (Prescribed Routes) (Camberwell) Regulations, 1959. (S.I. 1959 No. 438.) 4d.
London Traffic (Prescribed Routes) (Gravesend) Regulations, 1959. (S.I. 1959 No. 439.) 5d.
Manchester Water Order, 1959. (S.I. 1959 No. 426.) 6d.
Milk and Meals Grant Regulations, 1959. (S.I. 1959 No. 410.) 5d.
Milk (Special Designations) (Specified Areas) Order, 1959. (S.I. 1959 No. 446.) 5d.
Draft National Insurance (Marines) Amendment Regulations, 1959. 5d.
Newcastle-upon-Tyne-Edinburgh Trunk Road (Ancrun Bridge Diversion) Order, 1959. (S.I. 1959 No. 464.) 5d.

North of Scotland Hydro-Electric Board (Constructional Scheme No. 28) Confirmation Order, 1959. (S.I. 1959 No. 478.) 5d.
Parish Council Election Rules, 1959. (S.I. 1959 No. 431.) 5d.
Probation Rules, 1959. (S.I. 1959 No. 444.) 5d.
Provision of Milk and Meals Amending Regulations, 1959. (S.I. 1959 No. 409.) 5d.
Regulations for Grants to Local Museums and Art Galleries (Revocation) Regulations, 1959. (S.I. 1959 No. 449.) 4d.
Rules of the Supreme Court (No. 1), 1959. (S.I. 1959 No. 450.) 5d. See pp. 259 and 260, *ante*.
Rural District Council Election Rules, 1959. (S.I. 1959 No. 430.) 5d.
Schools Grant Amending Regulations No. 9, 1959. (S.I. 1959 No. 397.) 5d.
Stopping up of Highways (County of Derby) (No. 4) Order, 1959. (S.I. 1959 No. 414.) 5d.
Stopping up of Highways (County of Durham and County Borough of Gateshead) (No. 1) Order, 1959. (S.I. 1959 No. 437.) 5d.
Stopping up of Highways (County of Essex) (No. 4) Order, 1959. (S.I. 1959 No. 455.) 5d.
Stopping up of Highways (County of Essex) (No. 5) Order, 1959. (S.I. 1959 No. 456.) 5d.
Stopping up of Highways (County of Gloucester) (No. 5) Order, 1959. (S.I. 1959 No. 454.) 5d.
Stopping up of Highways (County of Kent) (No. 6) Order, 1959. (S.I. 1959 No. 415.) 5d.
Stopping up of Highways (County of Kent) (No. 8) Order, 1959. (S.I. 1959 No. 434.) 5d.
Stopping up of Highways (County of Kent) (No. 9) Order, 1959. (S.I. 1959 No. 435.) 5d.
Stopping up of Highways (County of Lancaster) (No. 4) Order, 1959. (S.I. 1959 No. 416.) 5d.
Stopping up of Highways (London) (No. 9) Order, 1959. (S.I. 1959 No. 392.) 5d.
Stopping up of Highways (London) (No. 10) Order, 1959. (S.I. 1959 No. 398.) 5d.
Stopping up of Highways (London) (No. 11) Order, 1959. (S.I. 1959 No. 457.) 5d.
Stopping up of Highways (County of Monmouth) (No. 1) Order, 1959. (S.I. 1959 No. 458.) 5d.
Stopping up of Highways (County of Stafford) (No. 4) Order, 1959. (S.I. 1959 No. 399.) 5d.
Stopping up of Highways (County of Suffolk, East) (No. 4) Order, 1959. (S.I. 1959 No. 436.) 5d.
Stopping up of Highways (County of Worcester) (No. 2) Order, 1959. (S.I. 1959 No. 417.) 5d.
Training of Teachers (Grant) Regulations, 1959. (S.I. 1959 No. 396.) 6d.
Training of Teachers (Local Education Authorities) Regulations, 1959. (S.I. 1959 No. 395.) 7d.
Tribunals and Inquiries Act, 1958 (Commencement) Order, 1959. (S.I. 1959 No. 451.) 4d. See p. 259, *ante*.
Tribunals and Inquiries (Revenue Tribunals) Order, 1959. (S.I. 1959 No. 452.) 5d. See p. 260, *ante*.
Wild Birds (Loch Garten Bird Sanctuary) Order, 1959. (S.I. 1959 No. 459.) 5d.

SELECTED APPOINTED DAYS

April

1st Adoption Act, 1958.
Adoption (County Court) Rules, 1959.
Adoption (High Court) Rules, 1959.
Children Act, 1958.
Drainage Rates Act, 1958.
Local Government Act, 1958, ss. 9 to 14, 57, 58 and Sched. IX.
Registration of Births, Deaths and Marriages (Special Provisions) Act, 1957.
Rules of the Supreme Court (No. 1), 1959.
Tribunals and Inquiries Act, 1958, ss. 8, 9 and 12.
Tribunals and Inquiries (Revenue Tribunals) Order, 1959.
6th Opencast Coal (Registration of Orders) Rules, 1959.
27th Food Standards (Ice-Cream) Regulations, 1959. S.I. 1959 No. 472.
Labelling of Food (Amendment) Regulations, 1959. S.I. 1959 No. 471.

NOTES OF CASES

The Notes of Cases in this issue are published by arrangement with the Council of Law Reporting, and full reports will be found in the Weekly Law Reports. Where possible the appropriate page reference is given at the end of the note.

Court of Appeal

CLAIM FOR DAMAGES: PAYMENT: FIXED COSTS: EXPRESS DENIAL OF LIABILITY: WHETHER DEFENDANT LIABLE FOR MORE THAN FIXED COSTS

Allott v. Wagon Repairers, Ltd.

Rutherford v. British Overseas Airways Corporation

Hodson, Morris and Willmer, L.J.J. 26th February, 1959

Appeal from Ashton-under-Lyne County Court.

Appeal from Westminster County Court.

These were two appeals, which were heard together. Both appeals raised the same point, the position being that in each case the plaintiff brought an action for damages in the county court against the defendants for personal injuries, and in each case the claim was for £400 damages. In one case it was stated to be for "£400 damages," and in the other the claim was stated to be "limited to £400," that being the limit of jurisdiction in the county court. In each case the defendants, in order to obtain the advantages which defendants achieve under Ord. 11, r. 1, of the County Court Rules, 1936, paid into court within eight days a sum of money, in each case £120, and in one case £7, and in the other £7 2s., which sums are called "fixed costs," Ord. 11, r. 1, being the fixed costs rule. In each case the plaintiff accepted the payment, and the only question which had arisen for determination by the Court of Appeal was whether the fixed costs rule applied, or, if it did not apply, whether Ord. 11, r. 2, applied, which also deals with payment into court. Under that rule "A defendant in an action may at any time before judgment pay money into court (a) in satisfaction of the claim." By sub-r. (3) it is provided that any payment made under this rule "shall be deemed to be made" with an admission of liability, unless accompanied by a notice that liability is denied. The defendants in each case paid in with a denial of liability. The contest between the parties was whether the plaintiffs were limited to the costs under the fixed costs rule, or whether, there being a denial of liability, the fixed costs rule did not apply and they were entitled to tax their costs under Ord. 11, r. 9.

HODSON, L.J., said that this was a very short question of construction of Ord. 11, r. (1) (b). The contention of the defendants was that this was one of those cases where money had been paid into court representing "so much of the claim as he [the defendant] admits to be due from him to the plaintiff," the £120 being part of the claim. The contention was answered very shortly in the second case under appeal by Judge Blagden in the Westminster County Court, who pointed out that the words "as he admits" in the paragraph could hardly include an express denial, and he accepted the submission of counsel for the plaintiff on the construction of the rule that it contemplated an admission of liability and could not apply when the liability was expressly denied. He (his lordship) confessed that he found it rather difficult to elaborate upon that. Accordingly, in the circumstances, the judgment of the county court judge at Westminster would be upheld with the consequence that in the first case, which had been considered at the same time, the judgment of the county court judge at Ashton-under-Lyne (who had come to a different conclusion) would be reversed.

MORRIS and WILLMER, L.J.J., delivered concurring judgments.

First appeal allowed.

Second appeal dismissed.

APPEARANCES IN THE FIRST APPEAL: John Thompson, Q.C., and D. Turner-Samuels (W. H. Thompson); Stephen Chapman, Q.C., and R. I. Kidwell (Hewitt, Woollacott & Chown, for James Chapman & Co., Manchester).

APPEARANCES IN THE SECOND APPEAL: Stephen Chapman, Q.C., and R. I. Kidwell (Goldingham, Wellington & Co.); John Thompson, Q.C., and D. Turner-Samuels (W. H. Thompson).

(Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law) [1 W.L.R. 384]

COMPULSORY PURCHASE: METHOD OF ASSESSING VALUE OF LOST GOODWILL: QUESTION OF FACT: EXPENSES INCURRED IN PREPARATION OF CLAIM

London County Council v. Tobin

Morris and Sellers, L.J.J., and Wynn Parry, J. 2nd March, 1959

Appeal by case stated from Lands Tribunal.

On 14th January, 1952, an acquiring authority served on an elderly optician in indifferent health a notice to treat in respect of the compulsory acquisition of his freehold business premises which he had occupied for forty years. He prepared his claim for compensation in response to the notice to treat, incurring in the process legal and accountant's expenses as well as surveyors' and valuers' fees. On 6th June, 1955, he moved to new leasehold premises a mile away, expended capital in converting them into a superior establishment, and continued his business with the added help of a qualified assistant. The reference of his claim to the Lands Tribunal was not heard until February, 1957, by which date there were available for consideration by the tribunal the figures of the gross takings and net profits of the business in the new premises during the preceding one and a half years, which figures showed that the earnings in the new premises were substantially higher than those in the old and were increasing. The particulars of claim included (a) a claim for damages to the goodwill of his business, and (b) the item for legal and accountant's costs incurred in preparing his claim. The tribunal found, *inter alia*, that the claimant had not at any material time any intention of selling his business; that there had been some loss of goodwill; and that the goodwill of a business increased in value the longer it was carried on at the same premises or near thereto. The tribunal awarded £750 for damage to goodwill, the figure being arrived at by comparing the capital value of the business at the old premises (calculated by multiplying by three years' purchase the average net profits for the three years prior to the move) with the capital value of the business at the new premises (calculated by multiplying by one and a half years' purchase the average of the net profits for 1955-56 and the estimated net profit for 1956-57). The tribunal included the legal and accountant's expenses as part of the total compensation awarded. The acquiring authority (the London County Council) appealed against those items of the award.

MORRIS, L.J., said that, as to the compensation for goodwill, the claimant had been compelled to relinquish the capital asset, namely, the goodwill which had resulted from his having built up an established business in his own premises at the old address. If, because of his enforced uprooting, his new capital asset, namely, the value of the goodwill of his business in the new premises, had been diminished, he had suffered a loss. It had been said that the method of approach of the tribunal was erroneous because it assumed a sale of the goodwill of the business in the new premises at or about the date of the hearing before the tribunal but that as no sale had taken place or was in prospect the award compensated the claimant for a loss which he had not suffered nor was about to suffer. In his lordship's view, the Lands Tribunal had compared like with like when they endeavoured to assess the value of the goodwill in the new premises, having before them the known facts of performance and achievement at the new address in the preceding one and a half years since the move. The difficult task of fixing the appropriate number of years to be taken was essentially a matter of judgment, having regard to the facts of the case; and the question as to the multiplier to be taken was essentially a question of fact for the tribunal and unless they had erred in principle it was not for the court to say that the decision was wrong in law. They had not neglected to take account of any of the relevant matters, and there was no error in their method of approach. On the legal and accountancy costs the question was whether, when compensation was claimed, an amount to cover the costs of preparing the claim could be included. If such costs were properly incurred it was appropriate to include them as one item in the claim for compensation. The provisions of s. 3 (5) of the Lands Tribunal

Act, 1949, and r. 49 of the Lands Tribunal Rules, 1956, referred only to "costs of the proceedings" and "costs of and incidental to any proceedings"; but when a claim was presented following on the request contained in a notice to treat, it might be the hope of both parties that there would never be "proceedings" before the Lands Tribunal. If a claimant could show that he had incurred expense in obtaining professional help for the preparation of his claim and that it was reasonable, the time for him to ask to be reimbursed was when he responded to the invitation in the notice to treat. The incurring of the expense would be a direct consequence of being dispossessed; accordingly the tribunal were in law entitled to hold that those fees formed a proper subject of compensation.

WYNN PARRY, J., concurring, said that short of some statutory modification of the Act of 1949, providing that legal costs incurred in compiling a claim should be subject to taxation, whether or not the claim was followed by a reference, his lordship did not see how the costs here in question could be treated as part of the costs of the reference to the Lands Tribunal. In compiling his claim the claimant had to incur legal costs. In order to arrive at a true figure of the loss he had incurred, he had to include the amount of such legal costs; otherwise his claim would be for less than the loss which he had suffered. On what principle could it be said that, if there should be a reference, the amount of his loss was to be reduced for the purposes of the reference by the whole of the amount of the legal costs which he had incurred? The Act, in s. 3 (5), only dealt with the costs of a reference; the rules made pursuant to the Act were wider in form; but his lordship could not see how the wider words "incidental" in r. 49 could take the costs out of the only place where they could find room prior to a reference, namely, the claim itself, and make them any part of the costs of the reference.

SELLERS, L.J., agreed with the judgments delivered. Appeal dismissed.

APPEARANCES: R. D. Stewart-Brown, Q.C., and K. F. Goodfellow (J. G. Barr); William Scrivens (Silkin & Silkin).

[Reported by Miss M. M. HILL, Barrister-at-Law] [1 W.L.R. 354]

PRACTICE AND PROCEDURE: CLAIM TO JURY IN CIVIL ACTION: WHETHER DEFENCE IMPUTING LIBEL TO PLAINTIFF A "CLAIM IN RESPECT OF LIBEL"

Shordiche-Churchward v. Cordle

Morris, Pearce and Willmer, L.J.J. 2nd March, 1959

Application for leave to appeal from Havers, J., in chambers.

The Administration of Justice (Miscellaneous Provisions) Act, 1933, provides by s. 6 (1): "... if on the application of any party to an action to be tried in the King's Bench Division of the High Court ... the court or a judge is satisfied that (a) a charge of fraud against that party; or (b) a claim in respect of libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage, is in issue, the action shall be ordered to be tried with a jury ...". The defendant and the plaintiff had formerly been husband and wife. After the dissolution of the marriage, the parties executed a deed whereby the defendant covenanted to pay certain sums subject to the condition that such covenant "shall be discharged and shall thenceforth become wholly void and of no effect ... if [the plaintiff] shall at any time hereafter ... publish or make any libellous or defamatory allegations to any person with regard to [the defendant] ...". The plaintiff brought an action claiming a sum of money under the deed. By his defence the defendant alleged that the deed had become discharged and void, because the plaintiff had published defamatory allegations about him; there was no counter-claim. An application by the plaintiff to have the action tried by a jury pursuant to s. 6 (1) was dismissed by the master and the judge in chambers. The plaintiff applied for leave to appeal.

MORRIS, L.J., said that the plaintiff's contention was that the defendant was putting forward a claim to be excused from paying because the plaintiff had defamed him; but the defendant was not, on the facts, making "a claim" but advancing a contention which involved an inquiry whether there had been a publication of defamatory matter. It could not fairly be said that there was "a claim" in respect of libel, or that such a

claim was "in issue." There was a contrast between "charge" in sub-cl. (a) and "claim" in sub-cl. (b).

PEARCE, L.J., agreeing, said that "a claim" in the subsection meant the assertion of a cause of action.

WILLMER, L.J., agreed. Appeal dismissed.

APPEARANCES: Geoffrey H. Crispin (S. Sydney Silverman); R. Graham Dow (Joynson-Hicks & Co.).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law] [1 W.L.R. 351]

Chancery Division

TRUST AND TRUSTEE: VARIATION OF TRUSTS ACT, 1958: PRACTICE

In re Chapman's Settlement Trusts (No. 2); Chapman v. Chapman; In re Rouse's Will Trusts

Vaisey, J. 12th, 18th February, 1959

Adjourned summonses.

In *In re Chapman's Settlement Trusts (No. 2)* the court was asked to approve, under s. 1 of the Variation of Trusts Act, 1958, on behalf of all persons beneficially interested, including infants and unborn infants, the variation of three settlements for the benefit of grandchildren by the deletion in each case of a clause under which the capital did not vest in the grandchildren until twenty-one years after the death of the settlor.

In *In re Rouse's Will Trusts* the court was asked to approve an arrangement under s. 1 of the Act by which the tenant for life was empowered to resort to part of the capital of the trust funds, and in return she released her power of appointment over part of the funds in favour of persons who, had she died at the date of application, would have been entitled in default of appointment as next-of-kin.

VAISEY, J., in the course of approving the arrangements as beneficial to the persons interested, gave the following directions with regard to the practice under the Act: As a general rule, applications under the Variation of Trusts Act, 1958, for the approval by the court of a variation of a trust should be heard in open court so that there might be uniformity of practice, and all interests on whose behalf the approval was sought might be represented by counsel, it being desirable that the trustees and the next-of-kin or beneficiaries should be separately represented. If there was any particular reason, such as the avoidance of embarrassing publicity, why the hearing should not be in open court, application might be made for the case to be heard in chambers. Where the court had approved a variation of a trust, a note of the letter, number, short title and date of the order should be endorsed on the probate of the will or on the settlement for the purpose of reference.

APPEARANCES: (CHAPMAN) Geoffrey Cross, Q.C., and J. A. Armstrong (Blundell, Baker & Co., for Wheldon, Houlby, Moore & Armstrongs and J. H. & H. F. Rennoldson, South Shields); John Bradburn (J. A. Wolfe with him) (same).

(ROUSE): F. E. Skone James (Lethbridges); G. C. Rafferty (same).

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] [1 W.L.R. 372]

TRUST AND TRUSTEE: VARIATION OF TRUSTS ACT, 1958: ENLARGEMENT OF TRUSTEES' INVESTMENT POWERS

In re Coates' Trusts

Harman, J. 20th February, 1959

In re Byng's Will Trusts

Vaisey, J. 24th February, 1959

Adjourned summonses.

In both these cases the trustees applied under s. 57 of the Trustee Act, 1925, or alternatively under s. 1 of the Variation of Trusts Act, 1958, to enlarge their powers of investment.

HARMAN, J., authorising the variation of the investment clause, said that the court had in recent years exercised a jurisdiction similar to that which it was now sought to invoke where large charitable funds were concerned (see in *In re Royal Society's Charitable Trusts* [1956] Ch. 87). There had, however, always been a doubt whether the same thing could be done under s. 57

of the Trustee Act, 1925, although there was no doubt that the court could authorise the sale of existing securities and investment in new ones. When application was first made he had invited counsel to amend the summonses by entitling them also "in the matter of the Variation of Trusts Act, 1958," which seemed a happy solution of the doubt, since the court had power under that Act, where trustees desired a change of investment, to approve an arrangement on behalf of persons under an incapacity, or unborn, or unascertained, or potentially interested under a discretionary trust.

VAISEY, J., similarly authorising the variation, said that he wished it to be known that in applications of this sort to vary investment clauses, one of two possible courses might be followed. One was to add a few words to the existing clause, and the other was to redraft the whole investment clause embracing the existing clause but excluding all dead wood, and adding the new powers. In the great majority of cases, of which this was one, the more convenient course was to produce a new clause containing the appropriate enlargement, and incorporating all that was worth saving of the existing range of choice. He wished counsel to draw a minute incorporating the new clause, supported by a further affidavit by the stockbroker showing that the clause as it now stood met with his approval. The entitlement under the Trustee Act, 1925, must be struck out and the order made under the Variation of Trusts Act, 1958. A note of the order should be endorsed on the probate of the will.

APPEARANCES (COATES): *H. E. Francis, P. J. Millett, John P. Brookes (Hunters).*

(BYNG): *D. A. Thomas, John Monckton, Peter Curry (Denton, Hall & Burgin, for Herbert, Simpson, Son & Bennett, Leicester).*

[Reported by Mrs. IRENE G. R. MOSES, Barrister-at-Law] [1 W.L.R. 375]

VARIATION OF TRUSTS: APPLICATION BY SOLE BENEFICIARY FOR VARIATION OF PROTECTIVE TRUSTS OPPOSED BY TRUSTEES: POWER OF COURT

In re Steed's Will Trusts

Harman, J. 25th February, 1959

Adjourned summons.

By his will, a testator gave and devised certain farm property to his trustees upon trust for sale upon protective trusts, as defined by s. 33 of the Trustee Act, 1925, for the benefit of the plaintiff for life, and after her death for such persons as she might by deed or will appoint, and in default of appointment,

upon trust for the persons entitled on the distribution of her estate, with a proviso that the plaintiff should have the use and enjoyment of the capital value thereof if she needed it, and that the trustees might apply capital moneys arising on the sale of the farm to or for her benefit provided that they should consider the necessity for retaining sufficient capital to prevent her from ever being without adequate means. The testator also gave to the trustees a sum of £4,000 on trust for the plaintiff on the same protective trusts, and with similar powers of appointment by the plaintiff, and for the use of capital for her benefit, and authorised the trustees to use the legacy for the purpose of providing a residence for her. The plaintiff exercised both powers of appointment by deed irrevocably in her own favour. By this summons the plaintiff sought the approval of the court under s. 1 of the Variation of Trusts Act, 1958, of an arrangement proposed by her varying the trusts so that the trustees would hold the farm and the legacy on trust for her absolutely, which arrangement the trustees did not consider would be for the benefit of the plaintiff.

HARMAN, J., said that the effect of the proposed "arrangement" would be to revoke the trusts and turn them into plain legacies to the plaintiff. The Act provided that there need be no other person beneficially interested capable of assenting to the arrangement, but that did not mean that the "arrangement" could be made by a sole beneficiary in face of the opposition of the trustees. The trustees did not surrender their discretion to the court, and it had been the law ever since *Gisborne v. Gisborne* (1877), 2 App. Cas. 300, that where trustees were properly exercising their discretion, the court was without power to override them or to take that discretion out of their hands. The Act was not meant to enable a beneficiary to override the discretionary powers and protective trusts which the trustees desired to exercise. But even if the court did have a discretionary power to approve this arrangement, his lordship would not have felt it right to override the discretion of the persons appointed by the testator to look after the plaintiff's affairs. Where responsible trustees clothed with this kind of delicate and difficult discretionary power by the testator wished to exercise it in a certain way it was not for the court to override them, and that it should have power to do so was not, in his lordship's view, within the contemplation of the Legislature when it passed the Act. Application dismissed.

APPEARANCES: *Eric Griffith (Field, Roscoe & Co., for Pretty, Dawson & Butters, Ipswich); L. H. L. Cohen (Sharpe, Pritchard and Co., for Barr & Co., Cambridge).*

[Reported by Miss J. F. LAMB, Barrister-at-Law]

[2 W.L.R. 470]

NOTES AND NEWS

Honours and Appointments

Mr. ALAN COLLINS, solicitor, of Scunthorpe, has been appointed coroner for the Kirton District in succession to Mr. Eric Dyson who is retiring.

Mr. E. R. HEWARD has been appointed a Chancery Master with effect from 1st May next, in succession to Master Woodthorpe who has retired.

Mr. HERBERT WILLIAM KIRKWOOD has been appointed Assistant Official Receiver for the Bankruptcy District of the County Courts of Southampton, Bournemouth, Newport and Ryde (I.O.W.), Portsmouth, Winchester, Salisbury, Dorchester and Yeovil.

Mr. J. NOEL MARTIN, solicitor, has been appointed town clerk of Wandsworth.

Mr. CHARLES RAWLINSON has been appointed Assistant Official Receiver for the Bankruptcy District of the County Courts of Canterbury, Rochester and Maidstone.

Mr. FRANK ALLEYNE STOCKDALE has been appointed deputy chairman of the Hampshire Quarter Sessions.

Mr. PETER WRIGHT has been appointed an Assistant Official Receiver for the Bankruptcy District of the County Courts of Cambridge, Kings Lynn, Peterborough, Ipswich, Bury St. Edmunds, Colchester, Northampton, Bedford and Luton.

CORRIGENDUM

One-Sided Immunity.—The last sentence of the Current Topic published under this heading at p. 243, *ante*, should have read:—

"We consider that, immediately there has been any waiving of diplomatic immunity, all matters outstanding between parties to an action should, as between them, immediately become subject to the court's jurisdiction."

The omission of the word "should" in the penultimate line is regretted.

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